No. 90-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,
vs.
JOSEPH PATRICK DOHERTY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* AMNESTY INTERNATIONAL and AMNESTY INTERNATIONAL — USA IN SUPPORT OF RESPONDENT

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BRIEF OF AMNESTY INTERNATIONAL AND AMNESTY INTERNATIONAL-USA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS

This brief is submitted amicus curiae by Amnesty International ("AI") and Amnesty International-USA ("AIUSA"), with the consent of the parties.

AIUSA is one of the 44 national sections of AI, an independent worldwide movement which works impartially to seek the release of "prisoners of conscience," defined as men and women detained anywhere because of their beliefs, color, sex, ethnic origin, language, or religious creed, provided they have not used or advocated the use of violence. AI also works for for fair and prompt trials for all political prisoners, and opposes torture or other cruel, inhuman or degrading treatment or punishment.

AI was founded in London in 1961 and now has more than 1,000,000 individual members, subscribers, and supporters in 150 countries. There are more than 4,200 AI groups in more than 70 countries, working in support of all aspects of AI's mandate. Since AI was founded, AI groups

have intervened on behalf of over 25,000 prisoners in more than 100 countries.

Basing its mandate on the Universal Declaration of Human Rights, GA Res. 217A, U.N. Doc. A/810 (1948), and other international standards for the protection of human rights, AI operates independently of any government, political grouping, ideology, economic interest or religious creed and does not therefore support or oppose the views of any person whose rights it seeks to protect. Nor does AI grade governments according to their record on human rights. Rather than attempting such comparisons, AI concentrates on trying to end specific human rights abuses within its mandate and advocates that all governments comply with international standards to protect human rights. For its work, AI received the Nobel Peace Prize in 1977.

On the basis of missions, interviews and a worldwide network of correspondents, AI's International Secretariat in London collects information and issues reports on human rights conditions throughout the world, including the United Kingdom. AI has also issued reports with respect to refugee protection -- including procedures for the determination of refugee status -- in a number of countries, including the United States. This information is disseminated to governments and the public in reports, interventions, and various other materials.[1]

AI's concern for refugees arises from its work for the protection of human rights, which includes opposition to the forcible return of any person to a country

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[1] AI has formal consultative status or similar formal relations with the United Nations ('U.N."), UNESCO, the Organization of American States, the Council of Europe, and the Organization of African Unity.

where he or she risk a threat to his or her life or freedom, because refugees who are so returned are or may become "prisoners of conscience." AI therefore seeks to ensure that governments observe the principle of <u>non-refoulement</u> -- expressed in the U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ("Convention"), as incorporated by the U.N. Protocol Relating to the Status of Refugees, January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S.268 ("Protocol")[2] -- and that all refugees

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[2] Although the United States is not a signatory to the Convention, since 1968 it has been a party to the Protocol, which incorporates Articles 2 through 34 of the Convention. The United States thereby agreed to be bound by all the obligations under the Convention. Accordingly, for the purposes of this brief, references to the Protocol and U.S. obligations under it will include the Convention and its provisions. Unless otherwise specified, references to "Articles" will be to Articles in the Convention, as incorporated by the Protocol.

have access to a fair and adequate refugee determination procedure. Accordingly, AI participated in the legislative process which led to the passage of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, et seq. (the "Refugee Act" or "Act"), and regularly provides information about country conditions and international legal standards to courts, administrative agencies, and decision-makers at all levels of the refugee process, including through the submission of amicus curiae briefs to this Court. See, e.g., INS v. Stevic, 467 U.S. 407 (1984); Jean v. Nelson, 472 U.S. 846 (1985).[3]

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[3] Although AI is often unable to express an opinion about the validity of a particular applicant's fear of persecution, the Immigration and Naturalization Service ("INS") and the courts have relied upon AI's expertise in assessing the human rights situation in various nations around the world for the purpose of evaluating an individual's request for asylum in this country. See, e.g., Fernandez-Roque v. Smith, 539 F. (continued...)

AI is specifically interested in this case because it raises an issue of due process for those who seek to exercise their right to non-refoulement under the Convention and Protocol that has dire implications for all refugees. AI's interest in this case is unrelated to the factual basis of Doherty's applications, but AI strongly holds the position that under international standards refugees are entitled to hearing on the merits of their non-refoulement claims by the established authority through a fair and adequate procedure, and that reliance on foreign policy considerations in denying such a hearing is inappropriate. It is AI's view that a dangerous precedent would

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[3](...continued)
Supp. 925 (N.D. Ga. 1982); Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977). The United States Congress has also recognized the integrity of AI's human rights information. See, e.g., International Financial Institutions Act of 1977, 22 U.S.C. § 262g.

be set if the executive branch of government were allowed, on the grounds of foreign policy considerations, to deny refugees a hearing on the merits of their non-refoulement claims. To grant such an executive veto would be wholly contrary to the protective purpose of international standards regarding refugee determination procedures and would put thousands of refugees seeking protection in the United States at risk of persecution.

SUMMARY OF ARGUMENT

AI and AIUSA respectfully urge this Court to affirm the Second Circuit's decision (1a-45a)[4] that the Refugee Act requires that a person seeking refuge from persecution in this country be afforded a hearing on those claims before being

[4] The opinion of the Court of Appeals is reported at 908 F.2d 1108 (2d Cir. 1990). "__a" refers to the Appendix to the Petition for Certiorari. "JA __" refers to the Joint Appendix.

subjected to deportation and that the statute prohibits the use of foreign policy consideration to deny such a hearing. The Court of Appeals decision is entirely consistent with, and indeed compelled by, this country's international obligations under the Protocol.

The Government claims that it may determine that Doherty is deportable, without a hearing, on the sole basis of the cold transcript of prior extradition proceedings in which the District Court found that the "political offense" exception to the Extradition Treaty between the United States and the United Kingdom barred Doherty's extradition.[5] G.

[5] See In re Doherty, 599 F.Supp. 270, 272 (S.D.N.Y. 1984); Treaty of Extradition, Oct. 21, 1976, United States-United Kingdom, art. V(1)(c)(i), 28 U.S.T. 230, T.I.A.S. No. 8468. On the face of this record, factual disputes remain in Doherty's case, including the question whether the United Kingdom recognized and separated members of the Provisional Irish

(continued...)

Brief, 35-36. Whatever the ultimate merits of Doherty's claims for asylum and withholding of deportation, the provisions and entire structure of the Protocol and the international system of protection of refugees based upon the Protocol's mandate that the claims of persons claiming to be refugees must be evaluated in the context of fair procedures.

Though the Protocol does not prescribe the precise contours of such proceedings, clearly the Government's claim that this decision may be made on the bare record of a prior extradition proceeding, without providing Doherty any opportunity to present evidence or to be heard on his claim for protection as a refugee, is manifestly inconsistent with the core principles of the Protocol and of

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[5](...continued)
Republican Army ("PIRA") as "political" prisoners. See JA 145-46.

the Refugee Act which Congress enacted to implement these international standards. The Protocol mandates that governments provide for the humane and nondiscriminatory treatment of "refugees" (i.e., any person who, owing to a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to return to his country of nationality or of his former habitual residence), Protocol Article I(2), and for certain rights and privileges to those who are "refugees." See, e.g., Articles 4, 15, 17 and 20-24 (requiring at least the same treatment for refugees as for nationals, with respect to freedom of religion, rights of association, employment and welfare, respectively).

Furthermore, the Protocol's explicit requirements to consider each particular

element for refugee determination, as well as its implicit requirement of fair and adequate procedures, direct that the United States may not, in the absence of a hearing, make the type of conclusions at issue in Doherty's case -- i.e., whether Doherty meets the definition of "refugee" so as to entitle him to protection (8 U.S.C. § 1101(a)(42); Article 1A(2)), whether he cannot be returned to the United Kingdom because his "life or freedom would be threatened" (8 U.S.C. § 1253(h)(1), Article 33.1) or whether he may be excluded from protection on the grounds that he has committed "serious non-political crimes" (8 U.S.C. § 1253(h)(2)(C); Article 1F(b)), or has "participated in the persecution of others on account of their political beliefs." (8 U.S.C. § 1101(a)(42); 1253(h)(2)(A)).

In denying Doherty's motion to reopen deportation proceedings on the ground that

he was not entitled to the relief of withholding of deportation and asylum, 46a-91a, the Attorney General purportedly resolved all legal and factual issues relating to Doherty's claim for protection as a refugee without any hearing on the merits to afford Doherty the opportunity to present evidence and argument as to the many factors relevant to a determination of refugee status. In reversing the Board of Immigration Appeals ("BIA") on Doherty's reopening claim, the Attorney General has also ignored the criteria prescribed by the Protocol. The Government recognizes these criteria as relevant (G. Brief, 41-45), but its post hoc recitation of the criteria is insufficient to comply with the requirements of the Act and Protocol.

The Government also expressly relies on the United States' foreign policy interests as grounds for denying Doherty's

application for a hearing. Nothing in the text or legislative history of the Refugee Act indicates that such factors are an appropriate basis for denying the refugee protections at issue in this case. Moreover, consideration of these factors is contrary to the clear purposes of the Act and the international legal principles of non-refoulement and non-discrimination, as expressed in Articles 33.1 and 3 of the Convention.

In reversing the Attorney General's decision, the Second Circuit noted first that the mandatory nature of the withholding remedy itself suggested the impropriety of determining entitlement to relief in the context of a motion to reopen (15a-17a); that the issues raised by Doherty's application presented "formidable questions of fact" (relating to his fear of persecution, the nature of the crimes for which he was convicted by a

British court, and the government's allegations that he had been involved in the persecution of others) that could not adequately be resolved without an evidentiary record (17a); and that, further, foreign policy interests could not serve as the basis for determining entitlement to these protections. 18a-27a. In construing the Act to require "examination of a fully developed record" as the "necessary precursor to the fair resolution of Doherty's claim, by an immigration judge, by the Board, and, if it comes to it, by this Court in another appeal," 17a (citations omitted), and in prohibiting consideration of U.S. foreign policy 18a-27a, the Second Circuit acted in accordance with the principles of minimal fairness required of the United States under the Protocol.

ARGUMENT

I. INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION OF REFUGEES REQUIRE THAT DOHERTY BE GIVEN A HEARING ON HIS APPLICATION FOR REFUGEE STATUS AND THE PROTECTION OF NON-REFOULEMENT

A. International Legal Standards Are Particularly Relevant To The Determination Of This Case

As international law is the law of the land under the United States Constitution, international legal standards for the protection of refugees expressed in treaties or in customary norms are relevant to the question whether the Attorney General may exercise his statutory discretion over motions to reopen deportation proceedings to determine the merits of Doherty's claim for protection as a refugee on the basis of a record developed in prior extradition proceedings and in the absence of any hearing specifically dedicated to the determination of Doherty's refugee status.

The consideration of international law standards is required in this case for several reasons. First, through the United States accession to the Protocol, the United States is bound by its obligations as a "Treat[y] made ... under the Authority of the United States," the provisions of which are the "supreme law of the land." U.S. Const., Art. VI § 2. Like all treaties, the Protocol therefore qualifies in some measure the sovereignty of the United States. See The F.S. Wimbledon (1923) P.C.I.J., ser. A, No. 1, 24, 25. The United States treaty obligations under the Convention require the government to comply with the non-refoulement requirement of Article 33.1. INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1986). The non-refoulement requirement of Article 33.1 must be given effect by the courts because it is self-executing. Cardoza-Fonseca, 480 U.S. at

429 ("Article 33.1 imposes a mandatory duty on contracting States")(emphasis added); See also, Coriolan, 559 F.2d at 996-997; Nicosia v. Wall, 442 F.2d 1005, 1006 n. 4 (5th Cir. 1971).

Second, international law has long been accepted as a principal referent in the interpretation of statutory and constitutional provisions, Fong Yue Ting v. United States, 149 U.S. 698 (1893) (international legal principles inform congress' power of exclusion and deportation of aliens), and must be applied by United States courts. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796).[6]

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[6] See also Restatement (Second), §§ 102, 135; Comment j (customary international law has the same force and effect as treaties and international agreements, and thus like federal statutes is the "law of the land."); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982) ("in an appropriate case, to ascertain what Congress has authorized, one must consider the treaties, agreements, and customary international (continued...)

Thus, federal statutes "ought never to be construed to violate the law of nations, if any other possible construction remains." Weinberger v. Rossi, 456 U.S. 25, 32 (1982), quoting Murray v. The Schooner Charming Betsey, 6 U.S. (2 Cranch) 64 (1804). This axiom is particularly compelling with regard to the Refugee Act in light of the Congressional intent to conform United States immigration law to the requirements of the Protocol.

In its landmark decision in Cardoza-Fonseca, this Court found support in the history and the plain language of the Refugee Act that international law for the protection of refugees both inspired the Act and continues to play an important

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[6](...continued) law to which the United States subscribes, as well as to domestic law."); Accord Bowater S.S. v. Patterson, 303 F.2d 369 (2d Cir.), cert. denied, 371 U.S. 860 (1962).

role in its interpretation. 480 U.S. at 436-437 ("If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.").[7]

In particular, the Refugee Act adopts the Convention's definition of "refugee," as well as its scheme of classifications and grants of protection for asylum and withholding of deportation, including the

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[7] See also, Stevic, 467 U.S. at 426-427 (Act adopted and expanded Protocol's definition of refugee and was intended to be construed in a manner consistent with it); S. Exec. Rep. No. 96-256, 96th Cong., 1st Sess. 1979, (the new statute was to be evidence of "our national commitment to human rights and humanitarian concerns" which had not been reflected in the previous immigration Acts).

provisions of Article 33.1. Id., at 424, discussing Stevic.[8]

The Handbook on Procedures and Criteria For Determining Refugee Status, (Geneva 1979)(the "Handbook") was also found by this Court to be a reliable source for interpreting the Act. Cardoza-Fonseca, 480 U.S. at n. 22 (while not binding, the Handbook provides "significant guidance in construing the Protocol, to which Congress sought to conform."). The Handbook evolved from an request of the Executive Committee of the U.N. High Commissioner for Refugees ("UNHCR") -- on which the United States sits -- that the Office of the UNHCR

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[8] Thus, Congress stated that it sought "to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law, and [felt] it both necessary and desirable that United States domestic law include the asylum provision in the instant legislation." Stevic, 467 U.S. at n. 20.

publish a handbook for the guidance of governments as to their obligations under the Protocol. Exec. Com. Concl. No. 8(XXVIII).[9]

It is incontrovertible that the Act is to be interpreted in light of the international law obligations relating to the protection of refugees[10], and that actions of the United States, including those undertaken by the Attorney General within the discretion conferred to him by the Act or regulations, must be consistent

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[9] Article II(1) of the Protocol, like Article 35 of the Convention, places an obligation on States Parties to "co-operate" with the UNHCR and "facilitate its duty of supervising the application of the provisions of the present Protocol." Such cooperation and facilitation requires, at a minimum, that States Parties observe authoritative conclusions of the Executive Committee of the UNHCR and follow the guidelines and interpretations of the Handbook.

[10] The Government appears to concede this point. G. Brief, 24-25, 41 n. 23, 43.

with this country's international legal obligations.

B. <u>International Standards Require That Doherty Be Given A Hearing On The Merits Of His Claims</u>

In denying Doherty's motion to reopen deportation proceedings on the ground that he was entitled to neither the mandatory relief of withholding of deportation under § 243(h) of the Refugee Act (because there were "serious reasons for considering that [Doherty] has committed a serious non-political crime outside of the United States," § 243(h)(2)(C), and because Doherty "assisted or otherwise participated in the persecution of ... person[s] on account of ... political opinion." § 243(h)(2)(A)), nor to the relief of asylum under § 208 because of foreign policy concerns, the Attorney General rendered an administrative decision that purportedly resolved all legal and factual issues

relevant to Doherty's claim without a hearing on the merits.

Since the right of refugees to non-refoulement protection is assured both by the Refugee Act and the Protocol, the question whether the Attorney General's exercise of discretion is contrary to law cannot be determined without reference to this country's international obligations under the Protocol. Under international law the merits of a claim for protection as a refugee may not be determined in the absence of fact-finding procedures adequate to protect this fundamental right. Thus, the Court of Appeals' conclusion that the Attorney General had no authority to determine Doherty's eligibility for the mandatory relief of withholding of deportation under § 243(h) without a hearing on the merits, (15a-17a) is consistent with the United States'

binding obligations under the Protocol, and should therefore be affirmed.

As a party to the Protocol[11], the

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[11] 107 States have ratified the Convention or the Protocol, thereby accepting the expression in Article 33.1 of the customary international norm of non-refoulement which has evolved into a principle proscribing both the expulsion of refugees back to the country of origin and the rejection of refugees at a country's borders. While Article 33.1 does not permit States Parties to place any reservations upon it, its scope has been delineated by allowing "international security" and "public order" as potential grounds for nonacceptance; however, these exceptions do not put into question the universal applicability of the principle. G. Goodwin-Gill, "The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees," Transnational Legal Problems of Refugees, (1982) Michigan Yearbook of International Legal Studies 291, at 304 (reviewing State practice in Australia, Belgium, France, the Federal Republic of Germany, the United Kingdom, and the United States). As such, Article 33.1 is a norm-creating provision, of the type recognized by the International Court of Justice. North Sea Continental Shelf Cases, [1969] I.C.J. 3, 42. The widespread recognition of the binding nature of non-refoulement is further born out by its inclusion in other international agreements (See, e.g.,

(continued...)

United States is bound by the obligation of non-refoulement of Article 33.1 which states, in pertinent part, that:

> (1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

This Court has found that Article 33.1 is the "counterpart" of § 243(h) of the Refugee Act, and that both prohibit refoulement and impose a mandatory duty not to return an alien to a country where his life or freedom would be threatened on account of one of the enumerated reasons. Cardoza-Fonseca, 480 U.S. at 429, 441.

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[11](...continued)
Article 3(1) Declaration on Territorial Asylum, (Dec. 14, 1967) A/RES/2312(XXII)), and its crystallization (since the end of World War II) into a customary international norm, so that its peremptory nature is now undisputed. G. Goodwin-Gill, supra, at 297-98.

This interpretation is consistent with the express legislative intent that § 243(h) is "based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 781, at 20.

Further, the Act's specification of particular procedures for the benefit of those seeking protection as refugees, was intended to ensure the substantive protections of the Protocol. Stevic, 467 U.S. at 416-421. Thus, in exercising his statutory discretion under the Refugee Act, the Attorney General must act in conformity with both the substantive requirements of the Protocol and the minimal standards of procedural fairness necessary to ensure the right it guarantees.

Neither the Convention nor the Protocol describe any specific procedures

for determining claims for refugee status and non-refoulement protection. However, since the purpose and intent of the Protocol is the protection of refugees[12], particularly through signatories'adherence to the non-reservable obligation of non-refoulement, it is axiomatic that the beneficiaries of protection -- the refugee(s) defined in Article 1 of the Convention -- must initially be identified.[13]

Consequently, a refusal or failure to undertake the task of identifying refugees through the establishment of a procedure

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[12] Parties to the Convention have, in its Preamble, recognized "the social and humanitarian nature of the problem of refugees" and "that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to asure refugees the widest possible exercise of [fundamental human rights]."

[13] The Handbook notes that "it is obvious that to enable States Parties to implement the provisions, refugees have to be identified." ¶ 189.

to determine refugee status constitutes a failure to implement the Convention and therefore the Protocol in good faith. Article 31(1) of the Vienna Convention in the Law of Treaties[14] strongly supports this conclusion. "Good faith" implementation of treaty provisions means that states are obliged to give effective implementation to treaty norms. A procedure to determine refugee status is simply the only means of applying Article 1 (especially the complex cessation and exclusion clauses), and of according to refugees the rights owed to them under the Convention and Protocol.

Effective implementation of the treaty norms also necessarily requires that the determination procedure be fair

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[14] U.N. Doc. A./Conf. 39/27 (1969). Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

and adequate in terms of being able to impartially and effectively identify those entitled to protection. The Handbook describes certain procedures adequate to meet the basic requirements. Proceeding from the principle that an individual enjoys presumptive refugee status prior to a formal determination on the merits of his or her claim for protection[15], the

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[15] Handbook, ¶ 28. (A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition.... He does not become a refugee because of recognition, but is recognized because he is a refugee) Accord See Vigile v. Sava, 535 F. Supp. 1002, 1014 (S.D.N.Y.) ("'Refugee' is a self-imposed label, not one requiring the imprimatur of the INS."), rev'd on other grounds, 684 F.2d 204 (2d Cir. 1982).

For this reason, aliens with a prima facie claim to refugees status are entitled to be treated with at least minimal fairness at the moment they present themselves for entry (i.e., before formal designation as a refugee), and to the protection of non-refoulement until they are conclusively determined not to be refugees. Report of the Arusha

(continued...)

Handbook notes that the determination of actual refugee status is a two-stage process, first to ascertain the relevant facts of the case, and second, to apply the legal definitions of the Convention and Protocol to those facts. Handbook ¶ 28, 29.

The Handbook's guidelines for methods of establishing the facts of an individual case illustrate the complexity of the fact-finding process and the need for procedures and personnel sensitive to the particular situation and vulnerability of the applicant. See Handbook ¶¶ 195-205. The Handbook also sets out guidelines for

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[15](...continued) Conference, Recommendation on the term "Refugee and Determination of Refugee Status, Executive Committee of the High Commissioner's Programme (30th Session) U.N. Doc. A/AC. 96/INF. 158, at 9. Such presumptive application of non-refoulement is common practice of States which have acceded to the Protocol and/or the Convention, generally under the rationale that it best ensures the right for genuine refugees. See Goodwin-Gill.

the interpretation of terms relevant to the determination of an applicant's claim of a well founded fear of persecution (See Handbook, ¶¶ 37-50, relating to the general analysis of the term, ¶¶ 51-53, ¶¶ 56-60, ¶65, relating to the term persecution, ¶¶ 66-86 relating to the enumerated grounds of race, religion, nationality, membership in a social group, political opinion).

These recommendations reflect the UNHCR's concern that in determining the facts of an individual's case, the criteria should be applied "in a spirit of justice and understanding" and should not be affected by any personal consideration that the applicant may be an '"undeserving case"' (Handbook para. 202). Thus,

> [t]he Examiner should: (i) Ensure that the applicant presents his case as fully as possible and with all available evidence. (ii) Assess and evaluate the applicant's credibility and evaluate the evidence . . . in order to establish the objective and subjective elements of the case. (iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status.

Handbook, ¶ 205(b) (emphasis added).[16] The Handbook therefore makes clear that the initial determination in any application must relate to the particular facts giving rise to an application for protection as a refugee, and that only after the facts are established in accordance with procedures adequate to elicit all relevant evidence and to permit decisions as to the applicant's

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[16] In fact, the obligation to hear an applicant's claim on the merits extends from the Handbook provision that "it is for the examiner to ascertain reasons for fear of persecution." ¶ 67. Moreover, the circumstances experienced by an applicant for refugee status require that he be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant's particular needs and difficulties. ¶ 190.

credibility, does the inquiry move to the application of the Protocol's legal standards.

Additionally, international law implicitly requires that asylum and deportation determinations be made by means of a hearing on the merits. For example, the Handbook requirements that "each applicant must show good reasons why he individually fears persecution" (¶ 45)(emphasis added), and that he "establish, to a reasonable degree" that he could not stay in or return to his country of origin (¶ 42)(emphasis added), imply that an applicant be given an opportunity to present evidence on his behalf.

Similarly, the UNHCR Executive Committee has recommended that an applicant should be given the "necessary facilities" for submitting his claim. Exec.Com. Concl. No. 8(XXVIII)(iv), quoted

at Handbook, ¶ 192.[17] Although the Conclusion lists an interpreter and access to the UNHCR as some examples of what constitutes "necessary facilities," these requirements could have no significance -- especially in light of the Handbook guidelines mandated by international law -- in the absence of otherwise adequate procedures, including a hearing on the merits of the claim for refugee status and protection.[18]

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[17] Executive Committee Conclusion No. 8(XXVIII) (1977) established "basic requirements" for State procedures for determining refugee status which were aimed at ensuring that "the applicant is provided with certain essential guarantees." Handbook, ¶ 192. Included within these are recommendations that the "competent official" who makes refugee determinations "should have clear instructions for dealing with cases which might come within the purview of the relevant international instruments" and should be required to act in accordance with the principle of non-refoulement. Id. 5.

[18] Moreover, this conclusion is supported by the entire framework of the

(continued...)

The Convention's definition of "refugee," and the Handbook's analysis is consistent with this Courts own examination of the definition of "refugee." Cardoza-Fonseca, 480 U.S. at 439-440. Under the Refugee Act, an applicant for refugee status must prove that he or she is a "refugee" by presenting proof of a well founded fear of persecution, and must demonstrate that his "life or freedom would be threatened." 8 U.S.C. §§ 1101(a)(42), 1253(h)(1). This Court has also recognized that the ambiguous nature of the term "well founded

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[18](...continued)
Refugee Act. There is no evidence that Congress intended for determinations regarding withholding of deportation to be made without establishing an evidentiary basis. Indeed, the Act and regulations set forth procedures for fair process of refugee claims in the form of hearings for exclusions, deportations, and affirmative actions by district directors. This is so even in the conext of a motion to reopen, because withholding is a mandatory remedy. See INS v. Abudu, 485 U.S. 94 (1988).

fear," as adopted into the Act from the Convention,[19] requires the examination of both the subjective feelings of the applicant[20] for asylum and the objective

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[19] Although [the withholding of deportation] section has been held by court and administrative decisions to accord to aliens the protection required under Article 33, the Committee feels it desirable, for the sake of clarity, to conform the language of that section to the Convention. ... As with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements. Stevic, at n. 20, H. Rep. at 17-18 (House Judiciary Committee Report).

[20] The Convention's definition significantly altered the previous method of defining refugee status by adding the subjective element of fear. (Handbook ¶¶ 37-38) which "is inseparable from an assessment of the personality of the applicant" (Handbook, ¶ 40) and of opinions and feelings of the applicant. Handbook, ¶ 52. The "determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin." Handbook, ¶¶ 37, 42.

(continued...)

reasons for the applicant's fear[21], and that this "can only be given meaning through a process of case-by case adjudication." Cardoza-Fonseca, 480 U.S. at 430-431, 448; Accord Handbook, ¶ 43 (each individual's situation must be assessed on its own merits). The need for an evidentiary hearing in refugee determinations is, therefore, bolstered by

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[20](...continued)
Thus, it is "necessary to take into account ... everything that may serve to indicate that the predominant motive for his application is fear." Handbook, ¶ 41. Moreover, "[d]ue to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not clear from the facts on the record." Handbook, ¶ 41.

[21] The Convention's definition of refugee includes the objective element that an applicant's fear be "well founded." Handbook ¶ 38. In establishing well-foundedness, "it is necessary to evaluate the statements made by the applicant." Handbook ¶ 42. However, the Handbook provides, in ¶ 42, testimony of the applicant "cannot ... be considered in the abstract, and must be viewed in the context of the relevant background situation.

the fact that the "key phrase" of the definition of refugee (i.e., "well founded fear of being persecuted") requires the appraisal of both subjective and objective factors. Handbook, ¶¶ 37-50; See also Alvarez-Flores, 909 F.2d 1, 5 (1st Cir. 1990).

Some factual, evidentiary inquiry is necessarily required to establish these factors and to form the basis for making the required legal determination. Several appellate courts have acknowledged that the standards require that the applicant make a showing "by credible, direct, and specific evidence." Alvarez-Flores, 909 F.2d at 5, quoting Diaz-Escobar, 782 F.2d 1488, 1492 (9th Cir. 1986).[22]

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[22] See also M.A. v. INS, 899 F.2d 304, 311 (4th Cir 1990 (en banc) ("To validate the 'well-foundedness' of his fear, [petitioner] must set forth specific, concrete facts"); Cruz-Lopez v. INS, 802 F.2d 1518, 1522 (4th Cir. 1986) ("specific facts" required for objective evaluation).

The Handbook's guidelines for the determination of refugee status support the Court of Appeals conclusion that it was an abuse of discretion for the Attorney General to deny Doherty's motion to reopen by determining without a full evidentiary record that he would not be entitled to non-refoulement protection as incorporated in § 243(h).

The Attorney General denied Doherty's motion to reopen on the grounds that he was ineligible for withholding of deportation because under the statutory exceptions to the otherwise mandatory remedy, there are "serious reasons for considering that [Doherty] has committed a serious non-political crime outside of the United States" § 243(h)(2)(C) and that Doherty "assisted or otherwise participated in the persecution of ... person[s] on account of ... political opinion § 243(h)(2)(A). 81a-91a.

This determination constitutes a decision on the merits of Doherty's claim. Thus, the procedures by which the "finding" is made that Doherty is not entitled to "refugee" status must comport with the international standards of both the Protocol and the Refugee Act. Under Article 1F(b) of the Convention, a person with regard to whom these are "serious reasons for considering" that he has "committed a serious non-political crime outside the country of refuge prior to his admission as a refugee" may be excluded from refugee status, even though otherwise demonstrating the characteristics of a refugee. While the statutory exceptions may "mirror" the exclusion clauses of Article 1F, the international standards require the same kind of scrupulous fact-finding with regard to the application of the exclusion clauses as applies to the

initial determination of eligibility for refugee protection.[23]

Additionally, the Handbook recommends a restrictive interpretation of the exclusion clauses. Because § 243(h) reflects the Protocol, and Congress expressly intended that it should be construed consistently with the Protocol, it is particularly appropriate for this Court to review the Attorney General's determination in light of the Handbook's guidelines concerning application of the exclusion clauses.

The Attorney General contends that the record of the extradition proceedings in

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[23] The Handbook's recommendations for fact-finding procedures take account of problems of proof that typically face a refugee because inherent in his situation is that, despite effort on his part, "there may still be a lack of evidence" and often he will not be "able to support his statements by documentary or other proof." Handbook, ¶¶ 196, 203. Thus, the Handbook notes that "it is ... frequently necessary to give the applicant the benefit of the doubt." Handbook, ¶ 203.

which the government sought unsuccessfully to extradite Doherty to the United Kingdom under the extradition treaty in effect between the two countries established a reasonable basis for concluding that Doherty was ineligible for protection under the statutory exclusions of § 243(h). 88a-90a; G. Brief, 35-36. The Attorney General's contention is wrong, however, in light of the standards of procedural fairness essential to effect the Protocol's mandate.

The Handbook requires several considerations for the application of Article 1F(b), including whether the applicant had committed a "crime,"[24] whether the crime was "serious," and whether that the crime is "non-political." Handbook, ¶¶ 152, 155. Determining the

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[24] All relevant factors regarding the crime, including mitigating and aggravating circumstances should be considered. Handbook, ¶ 157.

political nature of a crime depends upon: (1) the "nature and purpose" of the act "i.e. whether it has been committed out of genuine political motives and not merely for personal reasons or gain," (2) whether a "close and direct causal link between the crime committed and its alleged political purpose and object," and (3) whether the political element of the offence also outweighs its common-law character (i.e. whether the acts committed are proportionate to the alleged objective). Handbook, ¶ 152.

The Contracting State in whose territory the applicant seeks recognition of his refugee status must apply these exclusion clauses. Handbook, ¶ 149. As a general principle, the facts leading to an individual's exclusion will emerge during the process of determining that person's refugee status, i.e., during a fact-finding process sufficient to protect the

right of non-refoulement in a fair and non-discriminatory fashion.[25] Particularly with regard to exclusion of persons not considered deserving of international protection under Article 1F, the Handbook cautions that while governments must decide whether any of the exclusion clauses are applicable to an individual seeking refuge in their territories, "the interpretation of these clauses must be restrictive" because of the "serious consequences of exclusion for the person concerned." Handbook, ¶¶ 149, 180.

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[25] Paragraph 141 of the Handbook states:

> Normally it will be during the process of determining a person's refugee status that the facts leading to exclusion under these clauses will emerge. It may, however, also happen that facts justifying exclusion will become known only after a person has been recognized as a refugee.

Most importantly, "[i]n applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared." Handbook, ¶ 156.[26] Thus, an examination of the factors relevant to an assessment of the applicant's fear of persecution is necessarily required.[27]

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[26] See also, Handbook, ¶ 161 ("While there is thus a possibility of granting asylum, the gravity of the persecution of which the offender may have been in fear and the extent to which such fear is well-founded, will have to be duly considered in determining his possible refugee status under the 1951 Convention."). Accordingly, "[i]f a person has a well-founded fear of very severe persecution, ... a crime must be very grave in order to exclude him." Handbook, ¶ 156.

[27] That an "applicant must show that he has a fear of persecution for holding [political] opinions .... presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods." Handbook, ¶ 80. An applicant (continued...)

While the government recites the Handbook's criteria relating to the exclusion clauses and contends that the Attorney General's determination of Doherty's exclusion under § 243(h)(2)(C) is consistent with them, there can be no question that the Attorney General's determination was not based on the kind of

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[27] (...continued) must establish either a "causal link" between the opinion and the persecution or "the applicant's political opinion, which is at the root of his behavior, and the fact that it has led or may lead to the persecution that he claims to fear." Handbook, ¶ 81.

The Handbook permits political offenders to be refugees (¶ 84), and in such cases, "regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives. . . [and] the nature of the law on which the prosecution is based." Handbook, ¶ 86. The Handbook makes clear that "[t]hese elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment -- within the law -- for an act committed by him." Id.

fact-finding required under the Handbook guidelines to the Protocol. Thus, in concluding that Doherty's claim could not be decided on the merits without a hearing to develop a full evidentiary record, the Second Circuit gave effect to the substantive provisions of the Protocol and the minimal procedural protections necessary to protect its substantive rights.

The Attorney General's contention that Doherty was also ineligible for relief under the statutory exemption relating to persons who have persecuted others must be based on the same general principles and the same kind of detailed fact-finding that apply to the "serious crimes" exception. Since § 243(h) is to construed consistently with the Protocol, the statutory exceptions must conform to the Protocol's parameters for the

determination of eligibility for refuge status.

"Applications for refugee status are frequently made by persons who have used force or committed acts of violence." Handbook, ¶ 175.[28] As a basic principle, such applications "must in the first place -- like any other application -- be examined from the standpoint of the inclusion clauses in the 1951 Convention." Handbook, ¶ 176. Then, where it has been determined that an applicant fulfills the inclusion criteria, the question whether he is covered by one of the exclusion clauses may arise. Id.

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[28] Such use of force or acts of violence "may be associated with political activities or opinions, and which may have been committed within the framework of organized groups (either clandestine or political cum military organizations)." Handbook, ¶ 175. Similarly, political offenders may, in some cases, be refugees. Handbook, ¶ 84.

As the Second Circuit noted, and the Handbook confirms, Doherty's claim depends on the resolution of issues that raise "formidable questions of fact" and that a fair resolution of his claim cannot occur without the examination by an Immigration Judge, the BIA, and, if necessary, the federal courts, of a fully developed evidentiary record.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT FOREIGN POLICY CONCERNS ARE NOT A LEGITIMATE BASIS FOR THE DISCRETIONARY DENIAL OF ASYLUM UNDER SECTION 208(a) OF THE ACT

The Court of Appeals correctly found (1a-45a) that the Attorney General could not deny Doherty a hearing on his asylum claim on the grounds that the relief of asylum would be denied in light of unspecified "foreign policy interests" in the relationship between the United States and the United Kingdom, even if Doherty were otherwise eligible for refugee status.

Article 3[29] of the Convention specifically prohibits discrimination on the basis of country of origin. Discretionary denials of meritorious asylum claims on the basis of "foreign policy interests" necessarily result in such forbidden national origin discrimination.

Notably, the concurring decision of the BIA expressly found that Doherty was being discriminated against on the basis of his nationality. See 114a-115a. There is nothing in the legislative history or the language of § 208(a) of the Act that indicates that denials of asylum may be determined on the basis of the decision-maker's desire not to offend a particular

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[29] Article 3 states: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." Accord Articles 1(3), 55(c), U.N. Charter, June 20, 1945, 59 Stat. 1031, T.S. No. 933.

persecuting government. Indeed, in adopting the Protocol standards into the Act, Congress was conscious of the goal to achieve equality of treatment for all refugees regardless of country of origin. S. Rep. No. 96-256, 96th Cong., 1st Sess. 2-3 (1979). This right not to be discriminated against is by nature a procedural right, a right to equal treatment before the law. Thus, this norm in the Protocol and Act sets forth a minimum standard of treatment in the process relating to refugees, especially when regarding the entitlement to asylum.

The Court of Appeals correctly found that Congress chose to make asylum a discretionary form of relief from deportation. 22a. However, the House Judiciary Committee specifically noted that it was concerned that the asylum system be "fair and workable" and "consistent with this country's tradition

of welcoming the oppressed of other nations and with our obligations under international law." H.R. Rep. No. 96-608, 96th Cong., 2nd Sess. 17-18 (1979), cited at 24a. Among those obligations under international law was the Protocol's prohibition on discrimination based on country of origin. Concerned that irrelevant factors might influence discretionary denials of asylum, the House Judiciary Committee indicated an intent to "monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect." Id. Such an intent to ensure that discretion was not misused is entirely inconsistent with the unfettered discretion for which the Government argues. G. Brief, 18-34.

As the Court of Appeals correctly notes, discretionary denial of asylum to a refugee out of a concern to cultivate

friendly relations with the persecuting government "would clearly violate the spirit, if not the letter, of the Refugee Act...." 25a. In adopting a politically neutral definition of refugees in § 101(a)(42)(A) of the Act and in indicating an intent to implement fully the obligations of the Protocol (which include the ban on country of origin discrimination), "congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum." 21a.

The Court of Appeals also correctly noted the types of discretionary factors that are legitimate in asylum denials to claimants who otherwise meet the refugee definition. 24a-25a. In a series of cases, the BIA has identified such factors as abuse of the asylum process by bypassing opportunities for overseas refugee admission under § 207 of the Act

and abandonment of a settled position in a safe third country.[30] See, e.g., Matter of Salim, 18 I & N Dec. 311 (BIA 1982); Matter of Pula, Interim Dec. No. 3033 (BIA 1987); Matter of Soleimani, Interim Dec. No. 3118 (BIA 1989). Even these factors, however, must be balanced against the asylum claimant's risk of persecution. Matter of Pula, supra.

It is crucial to note the breadth of discretion for which the Government is arguing in this case. While the Attorney General personally made the decision in respondent's case, most asylum decisions are made by Immigration Judges in the course of deportation or exclusion hearings, or by a newly hired corps of asylum officers, who have been delegated

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[30] Asylum regulations issued July 27, 1990, established mandatory denials for asylum-seekers who have been "firmly resettled within the meaning of § 208.15" of the regulations. 55 Fed. Reg. 30683 (July 27, 1990).

this authority by the Attorney General. 8 C.F.R. §§ 208.2(a) and (b); 55 Fed. Reg. 30680 (July 27, 1990). The Government argues that § 208(a) "should not be construed to impose substantive, judicially enforceable limitations on the Attorney General's discretion to deny asylum to a particular alien." G. Brief, 25. This means that any officer to whom the Attorney General's discretion has been delegated under § 208(a) could consider any undefined, subjective concerns for foreign policy, including a desire not to offend a "friendly" persecuting government, in denying asylum to a bona fide refugee.

Such denials for foreign policy reasons would inevitably result in the type of national origin discrimination against refugees that the United States pledged not to engage in when it ratified the 1967 Protocol and reaffirmed when the

Refugee Act of 1980 was passed. Therefore, as noted in Section I, the Refugee Act should not be construed to violate the treaty obligations of the United States if any other construction is possible, especially in light of the "primary purpose" behind the Act, including § 208(a), which was to bring United States refugee law into conformance with the Protocol. Cardoza-Fonseca, 480 U.S. at 436-37; Weinberger v. Rossi, 456 U.S. 25, 31 (1982).

The Government can point to nothing in the language or the legislative history of § 208(a) to support its assertion that foreign policy concerns were intended by Congress to be a legitimate basis for discretionary denials of asylum. Instead, the Government repeatedly and misleadingly cites passages from the legislative history of § 207 of the Act, which concerns the fundamentally different

process for overseas refugee admissions. See G. Brief, 20-21, 29-32. Significantly, §207 was not adopted to implement the United States' international obligations, since the Protocol and Convention concern only persons who are either in the territory of the asylum state or at the frontier. The creation of an overseas refugee admissions program was an entirely voluntary undertaking by the United States, not required by any obligation under international law and entirely separate from grants of asylum or conformance to the obligation of non-refoulement.

The overseas refugee admissions program created by § 207 is a designedly political process. Congress and the Executive engage in annual consultations that set the numbers of refugees to be admitted and allocate these admission numbers by geographical region. Other

factors are also inserted to identify overseas refugees of special concern to the United States, and the basic refugee definition has even been diluted in order to accommodate admissions of certain favored groups.[31] Perspectives on the foreign policy concerns of the United States obviously affect the joint decisions of the political branches in administering the overseas refugee admission program.

Significantly, these admission quotas and national-original-based criteria apply only to the overseas refugee admissions program under § 207 and not to asylum determinations under § 208(a). See

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[31] See, e.g., the Lautenberg Amendment, Pub.L.No. 101-167, § 599D, 103 Stat. 1195, 1261 (1989) (providing that certain Jewish and Evangelical Christian citizens of the Soviet Union could qualify for refugee status by demonstrating a "credible basis" for fearing persecution, rather than meeting the higher "well-founded fear" standard).

Aleinikoff and Martin, Immigration Process and Policy (Second Interim Edition, 1991) at 754. Respondent Doherty is simply not "applying for relief as a refugee outside the United States" who can be denied entry on the grounds of "foreign policy interests." G. Brief, 21 (emphasis in original). He is applying for asylum and withholding of deportation, having already entered the United States, under the fundamentally different provisions of §§ 208(a) and 243(h) of the Act. Because the overseas refugee admissions program of § 207 is essentially political in nature, it is not subject to any form of judicial review. In contrast, Congress subjected denials of asylum and withholding of deportation under §§ 208(a) and 243(h) not only to administrative review by the BIA, but also to judicial review in the federal courts, when made in the context of deportation hearings, under § 106(a) of

the Act. In the context of exclusion hearings, judicial review is also fully available by means of habeas corpus under § 106(b) of the Act.

Apparent patterns of national origin discrimination in the administration of the asylum system, allegedly fueled by the foreign policy concerns of asylum adjudicators, have been a matter of great controversy in recent years. See Amnesty International, Reasonable Fear: Human Rights and United States Refugee Policy (March 1990). In the recent settlement of a landmark case alleging national origin discrimination against asylum applicants from El Salvador and Guatemala, American Baptist Churches v. Thornburgh, Civ. No. C-85-3255 RFP (N.D. Cal. Dec. 19, 1990), the Government reportedly admitted that

> "foreign policy and border enforcement considerations, along with the fact that an asylum applicant is from a country whose government the United States

> supports, are not relevant to the determination of whether the applicant has a 'well-founded fear of persecution.'"

Interpreter Releases, Vol. 67, No. 48 at 1483 (December 21, 1990). In settling the case, the Government agreed to reopen approximately 150,000 denials of asylum. Id. at 1481. What would be the point in the government's undertaking this vast expenditure and effort, if Salvadorans and Guatemalans could validly be denied asylum in an exercise of discretion, because of the foreign policy concern that recognizing their meritorious claims of persecution would embarrass governments friendly to the United States?

CONCLUSION

For all of the foregoing reasons this Court should affirm the judgment of the Court of Appeals and this country's international obligations under the Protocol.

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Respectfully submitted,

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